IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. KARL LOUIS GUILLEN, Petitioner.	)	2 CA-CR 2007-0019-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR93018631

Honorable Stephen F. McCarville, Judge

REVIEW GRANTED; RELIEF DENIED

Karl Louis Guillen — Buckeye
In Propria Persona

B R A M M E R, Judge.

¶1 Pursuant to a plea agreement, petitioner Karl Guillen pled no contest to second-degree murder following the stabbing of a fellow inmate. After finding no mitigating circumstances and numerous aggravating factors, the trial court sentenced Guillen to an aggravated, twenty-year term of imprisonment, to be served concurrently with the sentences he was already serving. The trial court summarily denied Guillen's pro se petition for post-

conviction relief, and we denied relief on his petition for review from that ruling. *State v. Guillen*, No. 2 CA-CR 00-0494-PR (memorandum decision filed May 22, 2001). About six years later, Guillen filed his second pro se post-conviction petition, in which he claimed, inter alia, that he is entitled to relief under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). The trial court denied his petition and his motion for rehearing/clarification, and this petition for review followed. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 At sentencing, the court cited as aggravating factors the use, threatened use, or possession of a dangerous weapon during the commission of the offense; emotional or financial harm to the victim and his family; Guillen's five[1] prior felony convictions; his prior criminal history involving violent offenses; and the fact that the offense occurred while Guillen was incarcerated. In his post-conviction petition, Guillen argued that, because *Apprendi* applies to him, a jury, rather than a judge, should have found the aggravating factors used to justify the aggravated sentence he received. The trial court denied relief on Guillen's *Apprendi* argument, noting that it had implied his claim was also based on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), for the following reasons:

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[1]In his first petition for post-conviction relief, Guillen argued that he had four, rather than five prior felony convictions. In our memorandum decision, we "defer[red] to the trial court's finding that it would have imposed the same sentence regardless of the deficiencies in the sentencing process petitioner alleged."

> The only aggravating factor that arguably would require a finding by a jury is the financial or emotional harm to the victim. . . . All other factors are inherent in the plea or not subject to the *Apprendi* and *Blakely* decisions. As previously noted, those decisions are not retroactive, and regardless the defendant had other aggravating factors (4 prior felony convictions) to support the aggravated term . . . .

¶3 The trial court erroneously found *Apprendi* does not apply to this case. Guillen's conviction became final when our mandate issued on June 27, 2001, after *Apprendi* was decided on June 26, 2000. *See State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (a defendant's conviction is final after judgment of conviction entered, availability of appeal exhausted, and petition for certiorari denied or time for filing one has passed); *see also State v. Ward*, 211 Ariz. 158, ¶ 9, 118 P.3d 1122, 1125-26 (App. 2005) (post-conviction relief proceeding for pleading defendant functional equivalent of direct appeal). *Apprendi* applies to defendants like Guillen, whose convictions are not yet final when *Apprendi* was decided. *See State v. Sepulveda*, 201 Ariz. 158, ¶ 4, 32 P.3d 1085, 1086 (App. 2001). Nevertheless, Guillen is not entitled to relief based on *Apprendi*.

¶4 In *Apprendi*, the Supreme Court held that the Sixth Amendment to the United States Constitution requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362-63. Here, one of the aggravating circumstances the sentencing judge had relied on was Guillen's prior convictions, which both *Apprendi* and *Blakely* exempt from the jury trial

requirement. Once the judge found Guillen's prior convictions, the existence of which he does not dispute in his petition for review, were an aggravating circumstance, he could properly find the remaining factors to aggravate Guillen's sentence. *See State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005) (finding one *Blakely*-exempt aggravating factor renders defendant constitutionally eligible for aggravated sentence). Accordingly, although we disagree with the trial court's finding that *Apprendi* does not apply to Guillen, we nonetheless find its result correct. *See State v. Saiers*, 196 Ariz. 20, ¶ 15, 992 P.2d 612, 616 (App. 1999).

¶5 In light of our finding that Guillen's sentence does not violate *Apprendi*, we reject his argument that the sentencing court improperly struck the mitigating factors when it considered the aggravating ones in the absence of a jury. We also note Guillen raised this same issue, although not in the context of *Apprendi*, in his first post-conviction petition. We also reject Guillen's unsupported claim that the sentencing court considered his prior convictions as a "composite" to show his predisposition to commit subsequent violent offenses, rather than considering them as discrete aggravating factors. We further note this court did not find in its prior memorandum decision that the prior convictions "were used compositely to indicate Petitioner's proclivity for violent repeat offender activity," as Guillen suggests we did. In addition, we decline to address Guillen's claim that the trial court previously had erred when it denied relief on his first petition based on the mistaken belief that he had a matter pending on appeal at that time. Any challenge to the court's ruling in

his first Rule 32 petition is not before us. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii), 17 A.R.S. We likewise reject Guillen's claims of ineffective assistance of trial counsel. Having raised almost identical claims of ineffective assistance in his first post-conviction proceeding, he is precluded from raising any such claims now. *See* Ariz. R. Crim. P. 32.2(a)(2).

¶6 Therefore, the petition for review is granted, but relief is denied.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge